IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5952

IN RE ESTATE OF SHERMAN GORDON,
Deceased,

DETA MONA TRIMBLE, and JESSIE TRIMBLE,
Appellants,

—v.—

JOSEPH ROOSEVELT GORDON, ETHEL MAE KING, WILLIAM GORDON, HELLIE MAE GORDEY, and MARY LOIS GORDON,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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Interest of Amicus */

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated to defending civil liberties. The ACLU has a long-standing institutional interest in protecting the constitutional rights of children, legitimate and illegitimate. Attorneys of the ACLU have appeared before this Court to argue In Re Gault, 387 U.S. 1 and Levy v. Louisiana, 391 U.S. 68. The former decision held that children involved in juvenile proceedings were entitled to a wide range of constitutional protections in such proceedings. The latter decision held that illegitimate children were entitled as a constitutional matter to pursue an action for money damages incurred by the wrongful death of their natural mother. In addition, the ACLU filed briefs amicus curiae in both Labine v. Vincent, 401 U.S. 532 and Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, each involving issues directly relevant to the ones here.

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*/ Letters of consent by counsel for the Appellants and the Appellees to the filing of this brief have been lodged with the Clerk of the Court.

The issues in this case draw into question the right of illegitimate children to inherit from their father's estate. Resolution of those issues turns on the proper application of equal protection principles and the continued validity of the ruling in Labine v. Vincent, supra. We believe that our brief will assist the Court in resolving those questions.

Statement of the Case

Appellant Deta Mona Trimble was the illegitimate daughter of Sherman Gordon, who died on May 23, 1974, leaving no will. Gordon's paternity was certified by the Circuit Court of Cook County in a suit for support brought by appellant Jessie Trimble, the mother of Deta Mona Trimble. Gordon publicly acknowledged Deta Mona Trimble as his child and supported her pursuant to the court's paternity order.

Appellant Deta Mona Trimble was barred from inheriting from her father's estate by operation of Illinois Probate Act, Section 12, which declares that illegitimate children may inherit from and through their mothers, but not from or through their fathers who die intestate. See In re Estate of Karas, 61 Ill. 2d 40 (1975), upon which the Illinois Supreme Court relied in rejecting appellants' challenge to the Illinois Act.

Questions Presented

1. Does Section 12 of the Illinois Probate Act invidiously discriminate both against and among illegitimate children, thereby denying them equal protection of the laws?

2. Should this Court's decision in Labine v. Vincent, 401 U.S. 532, be overruled?

3. Are state classifications based upon legitimacy of birth "suspect" under the Fourteenth Amendment?

4. Does Section 12 of the Illinois Probate Act invidiously discriminate on the basis of sex, in violation of the Fourteenth Amendment to the United States Constitution?

Introduction and Summary of Argument

The Court once again must consider the constitutionality of a state discrimination against children who are born out of wedlock. In a series of decisions commencing with Levy v. Louisiana, 391 U.S. 68, [1] the Court has struck down a host of such classifications pursuant to the equal protection clause of the Fourteenth Amendment, and has indicated in no uncertain terms that "a state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." Gomez v. Perez, 409 U.S. 535, 537. The sole exception to the Court's disapproval of such classifications came in Labine v. Vincent, 401 U.S. 532, which upheld Louisiana's unique inheritance statute by which unacknowledged illegitimate children had no right to inherit from either parent.

Relying entirely on Labine, the Illinois Supreme Court in the instant case upheld

1/ See Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164; Gomez v. Perez, 409 U.S. 532; Davis v. Richardson, 409 U.S. 1069; Griffin v. Richardson, 409 U.S. 1069; New Jersey Welfare Rights Org. v. Richardson, 411 U.S. 619; Jimenez v. Weinberger, 417 U.S. 628.

a state statutory scheme by which illegitimate children are barred absolutely from inheriting from their fathers, but not from their mothers. The Illinois Court ignored several important distinctions between the Louisiana statutory scheme at issue in Labine and the Illinois scheme in question here, especially with respect to Louisiana's effort to provide for the well-being of all children of a deceased parent by requiring support or "alimony" from the parent's estate. Perhaps even more fundamentally, the Illinois Court failed to consider the effect on Labine of the subsequent decisions of this Court striking down state classifications based upon legitimacy of birth.

The decision of the Illinois Supreme Court cannot stand. This Court could render a relatively narrow decision reversing the judgment below upon a close and studied analysis of the distinctions between the instant case and Labine. [2] Such a decision, however, would only postpone the inevitable and maintain the confused state

2/ We refer the Court to the excellent analysis in the Jurisdictional Statement and the Brief for Appellants for fuller analysis and argument on this point.

of the law viz-a-viz illegitimacy classifications upon which both courts and constitutional scholars have commented at length.3/

Amicus therefore urge the Court to reconsider the Labine holding in light of the constitutional doctrine that has evolved since that decision. We submit that such reconsideration compels the conclusion that Labine no longer is good law and should be overruled.

Concomitantly with reconsideration of Labine, the Court should decide whether classifications based upon legitimacy of birth are "suspect" for purposes of equal protection analysis under the Fourteenth Amendment, and therefore can be upheld only when they further a compelling state interest by the least restrictive means necessary to that end. See Graham v. Richardson, 403 U.S. 365; In re Griffiths, 413 U.S. 717.

3/ See, e.g., Eskra v. Morton, 380 F.Supp. 205, 214-215 (W.D. Wisc. 1974), reversed 524 F.2d 9 (7th Cir. 1975)(Stevens, J.); Norton v. Weinberger, 364 F.Supp. 1117 (D. Md. 1973), vac. and remanded, 418 U.S. 902, on remand, 390 F.Supp. 1084 (D. Md. 1975), juris. postponed to hearing on merits, ____ U.S. ____, 95 S.Ct. 2676; Lucas v. Secretary of HEW, 390 F.Supp. 1310 (D.R.I. 1975), prob. juris noted, ____U.S.____, 46 L.Ed.2d 36; Gunther, Constitutional Law (9th Ed. 1975), p. 757.

While in recent decisions the Court has discussed such classifications in terms usually reserved for "suspect" classifications, see Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175-176; Jimenez v. Weinberger, 417 U.S. 628, 631, it heretofore has found it unnecessary to reach that question. Consideration of this issue will eliminate the confusion engendered in the state and federal courts as to the status of "illegitimacy" classifications, which confusion resulted in the erroneous decision of the court below. Analysis of the nature of such classifications will show dispositively that illegitimacy, like race and nationality and even more so than alienage, must be deemed a "suspect" classification under the Fourteenth Amendment.

Finally, irrespective of the lawfulness of its classification based on legitimacy of birth, the Illinois Probate Act, by barring illegitimate children from inheriting from their father and not from their mother, invidiously discriminates on the basis of sex and therefore is unconstitutional in two crucial respects. First, the Act imposes on the surviving mother of an illegitimate child whose father dies intestate the burden of supporting the child without assistance from the father's estate,

but imposes no similar burden on the surviving father of an illegitimate child whose mother dies intestate. Second, the Act deprives a father who dies intestate, but not a mother, of the opportunity to provide through his estate for the "care, custody and management of his or her [illegitimate] children." Stanley v. Illinois, 405 U.S. 645, 651.

ARGUMENT

I

Labine v. Vincent Should Be Overruled, Irrespective of the Suspectness of Classifications Based Upon Legitimacy of Birth.

The Court's opinion in Labine was perhaps the most unusual decision involving the equal protection clause in the modern era. It departed fundamentally from the mode of analysis applied in every other case involving a non-frivolous equal protection claim. Whatever basis there may have been for the Court's approach in

Labine at the time it was decided, subsequent doctrinal developments have undermined it entirely.

The Court is well aware of the standards of review applied in cases involving equal protection claims. In the generality of cases the "traditional" test has been applied. The standard was first stated in Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U.S. 150, 155, and was fully articulated in F. S. Royster Guano Co. v. Virginia, 253 U.S. 412:

> "But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."
> 253 U.S. at 415.

See also Morey v. Doud, 354 U.S. 457; Reed v. Reed, 404 U.S. 71.

In recent decisions the Court has tightened the "traditional" standard in striking down a variety of state classifications. The Court has insisted that the classification substantially further the State's interest, Reed v. Reed, supra, 404 U.S. at 75-76; Eisenstadt v. Baird, 405 U.S.

435, 446-455; James v. Strange, 407 U.S. 128, 140-141, that it further an important state interest, Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172-176, and that the state interest be articulated, non-illusory, and not left tc be conjured by the imagination of judges. McGinnis v. Royster, 410 U.S. 263; Jiminez v. Weinberger, 417 U.S. 628; Weinberger v. Wiesenfeld, 420 U.S. 636. See Gunther, The Supreme Court 1971 Term, Foreward, In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection, 86 Harv. L. Rev. 1, 10-20 (1972).

A stricter standard under the equal protection clause is applied in two sets of circumstances. Where it is found either that the state classification is based upon an "inherently suspect" characteristic, or that the regulation infringes upon a "fundamental right or liberty," the presumption of constitutionality normally accorded state enactments is reversed. McKay, Political Thickets and Crazy Quilts: Reapportionment and Equal Protection, 61 Mich. L. Rev. 645, 666; 667 (1973). The statute will stand only if there "clearly appears. . . some overriding statutory purpose. . ." McLaughlin v. Florida, 379 U.S. 184, 192, or it is "necessary to promote a compelling governmental interest." Shapiro v. Thompson, 394 U.S. 618, 634. See Brown v. Board of Education, 347 U.S. 483; Harper v. Board of Elections, 383 U.S. 663, 669, 670; Williams v. Rhodes, 393 U.S. 16; Griffin v.

Illinois, 351 U.S. 12. The state must demonstrate that there are no reasonable alternative means of accomplishing the stated purpose without discriminating, Carrington v. Rash, 380 U.S. 89, and that the classification is neither impermissibly overbroad nor underinclusive. Kramer v. Union Free School District, 395 U.S. 621.

The Labine Court failed to analyze the illegitimacy classification at issue there in terms of either of the applicable standards of review. Rather, it suggested that the states' power to regulate the devolution of private property was plenary and beyond the scope or reach of the Fourteenth Amendment:

> "[T]he power to make rules to establish, protect and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislative of that State." 401 U.S. at 538.

In only one brief passage, in a footnote, did the Court even suggest that the classification might be subject to constitutional scrutiny, and the language used made clear that such scrutiny was not

applied:

> "Even if we were to apply the 'rational basis' test,...[the] statute clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property within the State." Id. at 536 n. 6. 4/

The Court then concluded with language equating illegitimates with concubines, Id. at 538, suggesting that a state's disapproval of illegitimacy - and illegitimates - furthered its interest in maintaining standards of morality and family unity.

Both the approach and the rationale of Labine have been rejected by the Court. It now is beyond doubt that the authority of the states to regulate matters of intestacy and devolution of property must be exercised in accordance with the mandate of the Fourteenth Amendment. In Reed v. Reed, 404 U.S. 71, the Court examined an Idaho law regulating the disposition of a

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4/ We show post that the "rational basis" in the Labine footnote is neither proper nor sufficient to withstand constitutional attack.

decedent's property and found the sex-based classification at issue not to bear a "fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." 404 U.S. at 75-76. Indeed, the Reed case would seem better suited to the Labine Court's suggestion that state regulation of intestacy is plenary, because the discrimination in Reed involved the administration of estates rather than the much more important rights of inheritance per se.

The more recent decisions involving classifications based upon legitimacy also abandon suggestions in Labine that such discrimination is not a proper subject for equal protection review. Weber, Gomez, and Jimenez, in particular, manifest a continuing and deepening concern that the social stigma placed on illegitimates by segments of society not be furthered and aggravated by state laws which serve no useful purpose:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liasons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual

> responsibility of wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual - as well as unjust - way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where - as in this case - the classification is justified by no legitimate state interest, compelling or otherwise." Weber, 406 U.S. at 175-176; see also Jimenez, 417 U.S. at 632.

Thus, Labine's failure to analyze the discrimination at issue in that case no longer can be followed. Nor can the "rational basis" suggested in footnote 6 of that opinion - i.e., that the State's interest in "promoting family life" is furthered by the classification - support the decision. While subsequent cases continue to recognize the State's interest in preserving ahd promoting family life, the Court has noted that discrimination against illegitimate children is a particularly irrational and ill-suited means to further that end:

> "We do not question the importance of that interest: what we do question is how the challenged statute will promote it ... Nor can it be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits. . ." Weber, supra, 406 U.S. at 173.

See also Glona v. American Guarantee and Liability Ins. Co., 391 U.S. 73, 75. 5/

Discrimination against illegitimates commonly has been defended as furthering the state's interest in assuring the financial integrity of the "legal family unit." See Mitchell v. Mitchell, 257 A.2d 496 (D. C. App. 1969), aff'd 445 F.2d 722 (D.C. Cir. 1971); Baston v. Sears, 239 N.E. 2d 62

5/ In a survey of 2031 families in Illinois, "carefully selected to represent the whole population of Illinois," only twenty percent of those polled agreed with the following statement: "The discrimination imposed by our law on the illegitimate child is an effective way to discourage sexual intercourse between unmarried persons." Eighty percent either disagreed or had no opinion. Krause, Illegitimacy: Law and Social Policy, 161-162, 171 (1971).

(Ohio 1968). 6/ By assuring that a man's estate is not diluted by claims of illegitimate children, so the argument runs, the state guarantees that his legitimate children may fully draw upon the resources of his estate.

The circularity of this argument is apparent. The very question at issue is whether the state may discriminate between legitimate and illegitimate children in defining the family unit which may inherit a person's estate. While the interest of the state in providing for the security of the family unit is unquestioned, it may do so only in ways that do not invidiously discriminate in violation of the Fourteenth Amendment. Mere repetition of the fact that illegitimate children are not a "recognized" part of the legal family and are not now entitled to inherit is not sufficient to justify the state provision to that effect.

Moreover, the flagrant overbreadth and underinclusiveness of the illegitimacy-classifications in the Illinois intestacy statute exposes the emptiness of the claim that the discrimination involved here is

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6/ The Mitchell and Baston decisions no longer stand in light of Gomez v. Perez, supra.

meant to preserve the financial integrity of the legal family unit. The classification is overbroad in that illegitimate children of unmarried men who have no "legal family" to protect have no more right to inherit from their father through intestacy than do illegitimate children of married men who are fathers of legitimate children. If the purpose of the discriminatory classification is to insure the financial viability of the "legal family unit," only the latter group of illegitimate children should be barred from inheritance. That such is not the case exposes the vacuity of the purported "integrity of the family unit" rationale. 7/

The classification is also underinclusive. Illegitimate children of married women may inherit from their mother on an equal basis with the mother's legitimate children. If illegitimate children of married fathers are barred from inheritance to protect the integrity of the legal family unit, the same rationale should apply

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7/ The discriminatory classification at issue here is overbroad in a second way in that illegitimates may not inherit from their father even if his estate is large enough to provide fully for his legitimate family.

with respect to inheritance through mothers. 8/

The over and underinclusive nature of the classification underscores the fact that it is not related to any state interest in the financial integrity of the family. Rather, it simply and unjustifiably imposes a penalty upon the helpless children involved, furthering the already substantial stigma of illegitimacy which they bear.

8/ While at the time of Labine there might have been some warrant to the view that the Levy case turned upon a special "mother-child" relationship, cf. Baston v. Sears, 239 N.E. 2d 62 (Ohio 1968), that theory was disposed of in Weber, which upheld the right of illegitimates to recover workmen's compensation for the death or injury of their father. See also Stanley v. Illinois, 405 U.S. 645.

As we argue post, the underinclusive nature of the Illinois inheritance classification invidiously discriminates on the basis of sex, and therefore independently violates the equal protection clause. Cf., Reed v. Reed, supra.

The Labine Court sought to distinguish inheritance statutes from tort laws such as in Levy on the ground that the decedent could have written a will, and therefore that there is no insurmountable barrier to an illegitimate child inheriting. Putting aside the fact that there was no insurmountable barrier in Levy either because the illegitimate child there could have been acknowledged, the fact is that a child can do nothing to compel a parent to write a will. Once the parent dies intestate, the barrier to the child in both Louisiana and Illinois is "insurmountable."

Indeed, a major purpose of intestacy statutes is to protect the family and children of a decedent against the possibility that he or she will not leave a valid will, either through irresponsibility, lack of sophistication, or inability to find or retain legal advice. To argue that a parent of an illegitimate child can surmount the obstacle to that child's inheritance by writing a valid will is to beg the question; if a valid will is written, the problem at issue here never arises. The question is whether the state, in protecting a child's inheritance from a parent's failure to write a will, may protect only legitimate children. A response that it may do so because the illegitimate children could have been protected if only the parent had written a will is totally circular.

Finally, any reliance the Labine Court may have placed upon difficulties of proof of paternity which might delay "prompt and definitive determinations of the ownership of property" no longer can supply the basis of a decision upholding discrimination against illegitimate children. While the Court has recognized as real "the lurking problems with respect to proof of paternity," Gomez v. Perez, supra, 409 U.S. at 538, it has held repeatedly that those problems may not "... be made into an impenetrable barrier that works to shield otherwise invidious discrimination." Id. See also Weber, 406 U.S. at 174; Stanley v. Illinois, 405 U.S. 645, 656-657.

In sum, both the mode of analysis and the rationale of Labine v. Vincent have been rejected explicitly and repeatedly in subsequent decisions of this Court. Application of the principles of those subsequent decisions requires that Labine be overruled. Further, analysis of the discriminatory classification against illegitimate children at issue in the instant case compels the conclusion that it "is justified by no legitimate state interest, compelling or otherwise" and that it therefore should be struck down. Weber v. Aetna Casualty & Surety Co., supra, 406 U.S. at 176.

II

Classification Based on Status of Birth are Suspect Under the Fourteenth Amendment; Therefore, Labine v. Vincent Must be Overruled.

If the Court were to find that the holding, if not the reasoning, of Labine can withstand constitutional analysis pursuant to the "traditional" equal protection standard of review, it must then decide whether or not classifications based upon status of birth are "suspect" under the Fourteenth Amendment. 9/ Amicus submits that the question must be answered in the affirmative, and that the classification at issue here cannot withstand the strict scrutiny required under the appropriate standard of review.

In its recent decisions, the Court has strongly suggested that state discrimina-

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9/ It is clear that the Labine Court never considered the question of whether illegitimacy is a "suspect" classification, and that it never subjected the inheritance classification at issue to strict scrutiny. At the most, the Labine Court applied a watered-down rational basis standard. 401 U.S. at 538, n. 6.

tions against illegitimates are "suspect" under the Fourteenth Amendment.[10/] To the extent that the decisions rested on this analysis, they were on solid ground. For classifications most often are suspect when they rest upon a status over which an individual has no control, such as race, Brown v. Board of Education, 347 U.S. 483; ancestry or nationality, Hirabayashi v. United States, 320 U.S. 81, 100, or alienage, Graham v. Richardson, 403 U.S. 365. It is obvious that a child can no more

10/ In Weber, the Court concluded its opinion by referring to the state classification there as imposing discriminations "relating to status of birth," 406 U.S. at 175 - the classic definition of a suspect classification. Graham v. Richardson, 403 U.S. 365. See also Gomez v. Perez, supra; Jimenez v. Weinberger, supra, 417 U.S. at 632.

Indeed, at least one member of this Court has read Weber and Gomez as establishing illegitimacy as a suspect classification. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 61 (Stewart, J., concurring).

In Levy, the Court stated: "...we have been extremely sensitive when it comes to basic civil rights.... The rights asserted here involve the intimate familial relationship between a child and his mother." 391 U.S. at 71.

control his legitimacy than he can control his race or ancestry. The illegitimate child is as entitled as the black child or the Japanese-American child to treatment as an individual rather than arbitrarily as a member of a minority group to which he belongs by the fact of birth. The state should be required to meet the same standard to justify discriminatory treatment of illegitimates as it must concerning racial, national or ethnic minorities. See Gray and Rudovsky, The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Co., 118 U. Pa. L. Rev. 1, 5-7 (1969).

The Court recently has delineated the "traditional indicia" of a suspect class in terms of society's treatment of that class:

> "[T]he class is ... saddled with disabilities or subjected to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political processes." San Antonio Ind. School District v. Rodriguez,

411 U.S. 1, 29. 11/

The history of the "purposeful unequal treatment" of illegitimates is manifest by the numerous cases this Court has had to decide in recent years involving just such discrimination. But the "disabilities" illegitimates have been subjected to go far beyond the specific details of any one case or statutory scheme. As the Court has recognized, the unequal treatment represents a "condemnation" by "society," a condemnation, however, "unjustly visit[ed] on the head of an infant." Weber, 406 U.S. at 175. And it is the unjustified stigma of inferiority which results from such condemnation that requires treatment of illegitimacy as a suspect classification. Cf. Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 424 (1960); Developments in the Law - Equal Protection, 82 Harv. L. Rev. 1065, 1127 (1969).

11/ The Court's language was reminiscent of the Carolene Products footnote in which the Court explained that there are "discrete and insular" minorities for whom heightened judicial solicitude is appropriate. U. S. v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4. See Graham v. Richardson, 403 U.S. 365, 372.

In Brown v. Board of Education, the Court specifically referred to the adverse effect of a stigma of racial inferiority upon the potential for educational achievement of black school children:

> "To separate [black school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . ." 347 U.S. at 494.

Similarly, in striking down a state anti-miscegenation statute in Loving v. Virginia, 388 U.S. 1, the Court held that the interests relied upon by the state to justify the classification were in themselves indicia of black inferiority:

> "[T]he state court concluded that the State's legitimate purposes were to 'preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,' obviously an endorsement of the doctrine of

White Supremacy." Id. at 7 (emphasis added). 12/

This Court has noted "the social opprobrium suffered by these hapless children." Weber v. Aetna Casualty & Surety Co., 406 U.S. at 175. The effect of the stigma of illegitimacy in our society has elsewhere been described as a "psychic catastrophe." 13/ Indeed, the psychological effect of the stigma of bastardy upon its victim 14/ is comparable to the damaging psychological effects upon the victims of racial discrimination.

12/ See also McLaughlin v. Florida, supra 379 U.S. at 193; Strauder v. West Virginia, 100 U.S. 303, 306-308.

13/ "In the case of illegitimate birth the child's reactions to life are bound to be completely abnormal. . . To be fatherless is hard enough, but to be fatherless with the stigma of illegitimate birth is a psychic catastrophe." Fodor, Emotional Trauma Resulting From Illegitimate Birth, 54 Archives of Neurology and Psychiatry 381 (1945).

14/ In Jenkins, An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children,

(continued on next page)

64 Am. J. Sociology 169 (1958), the author investigated whether there were significant differences in the "adjustment" of legitimate and illegitimate Negro school children. All children in the sample were recipients of Aid to Dependent Children's funds and otherwise lived in comparable economic and social circumstances. "Adjustment" was considered to be reflected in I.Q., age-grade placement, school absences, academic grades, teacher's rating, and personal and social adjustment as measured by the California test of personality. Jenkins reported that:

> Two primary patterns emerged in this study. First, the legitimate children rated higher in every area except school absences....
>
> The second discernible pattern was that the older group of illegitimate children consistently made a poorer showing than the younger group, in comparison with the legitimate children. A possible explanation for this is that, as these children grow older and are able to internalize fully the concept of illegitimacy and as they become increasingly aware of their socially inferior status, their adjustment to self and society may become progressively less satisfactory. Id. at 173.

Thus, all the ingredients requiring strict scrutiny under the Equal Protection Clause are present where state laws classify on the basis of illegitimacy. In addition, the Court has recently noted the constitutional priority of the right of a father to a full and legal relationship with his child, even when that child is illegitimate. In striking down under the Fourteenth Amendment an Illinois statutory scheme whereby an unwed father was deprived of custody of his illegitimate children without a hearing and without being given priority in subsequent adoption proceedings, the Court stated:

> "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements....
>
> "... Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony." Stanley v. Illinois, 405 U.S. 645, 651.

See also Prince v. Massachusetts, 321 U.S. 158, 166; Meyer v. Nebraska, 262 U.S. 390, 399; Skinner v. Oklahoma,

316 U.S. 535. 15/

The right of an illegitimate child to a legal relationship with his or her father equal to that afforded to a legitimate child must be of the same constitutional dimension as the right of a father to such a relationship with his child.

At stake in this case is the fundamental right of all children to grow up free from disabilities imposed by the state based solely on the circumstances of their birth; the right to an equal opportunity for individual development and fulfillment free from legal sanctions that create or support economic and psychological inferiority.

15/ The statutes at issue here and in Labine deprive a father who wishes to make his estate available to his illegitimate children and thereby to provide for their subsequent "care...and management" of the opportunity to do so in at least four circumstances: (1) if the father forgets to leave a will; (2) if he is not aware that a will is necessary to protect his illegitimate children; (3) if he cannot afford to write a will; (4) if he writes a will which is found to be invalid.

III

The Illinois Probate Act Invidiously Discriminates Against Appellants on The Basis of Sex In Violation Of The Fourteenth Amendment.

The instant case is quite different from Labine in an additional and fundamental respect. The Illinois Probate Act on its face classifies on the basis of the sex of a decedent parent (and therefore as well on the basis of the sex of the surviving parent) in a manner clearly affecting the interests of both parents in providing for the care and maintenance of their families. Analysis reveals that the classification cannot withstand constitutional scrutiny by any applicable standard of review under the equal protection clause.

At the time Labine was decided, the Court had not recently addressed the question of the effect of the equal protection clause upon state classifications based on sex. Since Labine, the Court has held that such classifications, at the least, must bear a "fair and substantial relationship" to a legitimate, non-illusory and articulated state purpose. Reed v. Reed, 404 U.S. 71, 75-76; Weinberger v. Wiesenfeld, 420 U.S. 636. And at least four Justices have stated the view that classifications based upon sex are "suspect" under the

Fourteenth Amendment, thereby triggering the strict scrutiny reserved for such discrimination (see discussion ante at 23-24). Frontiero v. Richardson, 411 U.S. 677 (plurality opinion).

Amicus American Civil Liberties Union consistently has urged the Court to treat sex as a suspect classification. See, e.g., Brief for Appellant in Reed v. Reed, supra; Brief for Amicus in Frontiero v. Richardson, supra. We, of course, adhere to that view for the reasons we stated in those cases. Adoption of the strict scrutiny standard of review clearly would dispose of the sex classification at issue in the present case. But even by applying the "fair and substantial relationship" test of Reed, there can be no constitutional basis for sustaining the discrimination imposed by the Illinois Probate Act.

The Illinois Act invidiously discriminates on the basis of sex in two important respects. First, it imposes on the mother of illegitimate children whose father dies intestate the burden of providing for their support without assistance from the father's estate, whether or not the father supported those children while he was alive. No similar burden is placed upon the father of illegitimate children whose mother dies intestate. His children may inherit from their mother, thereby easing the financial strain imposed upon the father by the

mother's death.

The above discrimination is more than irrational; it is counter-productive to the state's legitimate interest in assuring that children will be adequately and properly cared for by their parents without the necessity of becoming wards of the state, economic or otherwise. As the Court has noted, it is much more difficult in our society for a single woman to attain financial security than it is for a man:

> "There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other state exceed those facing the man. Whether from overt discrimination or from the socialization process of a dominated culture, the job market is inhospitable to the woman seeking any but the lowest paying jobs." Kahn v. Shevin, 416 U.S. 351, 353.

The classification at issue here, unlike that in the Kahn case, does not cushion the impact of society's sex discrimination; rather it exacerbates it in an obvious way. If disparate treatment is warranted at all, mothers of dependent illigitimate children require greater financial protection after the death of the father than do fathers in comparable circumstances. The Illinois Act perversely

and invidiously does just the opposite. It cannot withstand constitutional attack for that reason alone.

The Illinois Act discriminates on the basis of sex in another crucial respect. We already have noted the fundamental importance of a parent's interest in providing for the "care, custody and management of his or her children." Stanley v. Illinois, 405 U.S. 645, 651. See ante at pp. 30-31. Yet the Illinois Act deprives a father who will die intestate, but not a mother, of the power to make such provision without a valid will. 16/ That distinction is utterly without rational basis. Indeed, involving as it does an interest fundamental under the Constitution, it must be measured by the strict standard of review, whether or not sex itself is a suspect classification. Cf., Shapiro v. Thompson, 394 U.S. 618. That it cannot withstand strict scrutiny follows a fortiorari.

16/ We have shown that the failure to leave a valid will often derives from such factors as lack of sophistication in legal matters, lack of financial resources, or human error, and that the intestacy laws serve the function of protecting a person's closest family from such eventualities.

CONCLUSION

For all the reasons stated, the judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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